IBM Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–156–09 OF 2016
KAMALUDIN MD SAID J
27 MARCH 2018

Administrative Law — Judicial review — Application for certiorari — Whether application of judicial review premature — Whether advance ruling amounting to decision — Whether alternative remedy available to applicant — Whether payment of distribution fee amounting to royalty — Income Tax Act 1967 s 109

The applicant was in the business of distributing software. The applicant and the IBM Ireland Product Distribution Ltd ('the PDL') intended to execute software distribution agreement ('the said agreement') which would grant the applicant the right to distribute the software programs developed and owned by the PDL in Malaysia. On 12 April 2016, the applicant made an advance ruling application through the applicant's tax agent to the respondent. On 7 June 2016, the respondent issued its decision contained in the advance ruling. The respondent ruled that the distribution fee that the applicant paid was a royalty and thus was subject to withholding tax under s 109 of the Income Tax Act 1967 ('the Act'). The applicant then applied for a judicial review for an order of certiorari to quash the advance ruling issued by the respondent. The issues to be considered by the court were: (a) whether the application for judicial review was premature; (b) whether the domestic/appeal remedy under the Act was applicable to the applicant; (c) whether the advance ruling was a 'decision' which was amenable to judicial review; and (d) whether the advance ruling affected the applicant when the applicant can opt to not be bound by the advance ruling.

Held, allowing the applicant's application with cost of RM5,000:

(1) The court found that the applicant's application was not premature.The respondent had altered and deprived the applicant of its rights by subjecting the distribution fee to withholdingtax. The applicant in would suffer financial detriment and would have to pay tax (see para 40).

(2) The court did not agree with the respondent's averment that the advance ruling was merely the position or opinion of the respondent and hence not a decision. The advance ruling clearly had consequences which affect the applicant by subjecting the applicant to withholding tax for 'distribution fee'payable pursuant to the said agreement. The decision of the respondent in the advance ruling therefore gave rise to an issue of law

for determination by the court. The respondent had no basis to aver that the advance ruling did not amount to a 'decision'susceptible to judicial review (see paras 43, 45 & 54–55).

(3) There were no alternative remedies available to the applicant vis a vis the respondents' decision by way of advance ruling. The respondent had misinterpreted the law regarding its averment that there was an alternative remedy available for the applicant under the Act. In the present case, there was no assessment made nor was there any service of the notice of assessment. Hence, the right to appeal to Special Commissioner of Income Tax did not arise. There was no alternative remedy available to the applicant. The applicant was not accorded with any alternative remedy either under the Act or otherwise with regards to the respondent's failure to appreciate and gave effect to the settled case law and legislation in coming to the decision and the only remedy available was by way of judicial review (see paras 59–61 & 67).

(4) The court agreed with the applicant in a transaction where a distributor made payment to acquire and distribute software copies, the rights in relations to the acts of distributions should be disregarded in analysing the character of transactions for tax purposes. Payment of the types of transactions would be dealt as business profit under article 8 of Malaysia-Netherlands Double Taxation Agreement. The respondent's tax treatment in respect of distribution fee was erroneous (see paras 76–77).

(5) The decision of the respondent in its advance ruling was ultra vires, illegal, void, unlawful and/or in excess of authority as 'distribution fee' payable to PDL under the said agreement was not royalty (see para 82).

[Bahasa Malaysia summary

Pemohon menjalankan perniagaan membahagikan perisian. Pemohon telah menjalinkan satu perjanjian pembahagian perisian dengan IBM Ireland Product Distribution Ltd ('PDL') di mana pemohon diberikan hak untuk membahagikan program perisian yang diusahakan dan dimiliki oleh PDL di Malaysia. Pada 12 April 2016, pemohon membuat satu permohonan ketetapan awal melalui ejen cukai pemohon kepada responden. Pada 7 Jun 2016, responden mengisukan keputusannya dalam ketetapan awal tersebut di mana responden mengatakan fi pembahagian yang dibayar oleh pemohon adalah satu royalti dan tertakluk pada cukai di bawah s 109 Akta Cukai Pendapatan 1967 ('Akta tersebut'). Pemohon kemudiannya memohon satu semakam kehakiman untuk mendapatkan perintah certiorari bagi membatalkan ketetapan awal yang diisukan oleh responden. Antara isu yang dibangkitkan oleh mahkamah ialah: (a) sama ada permohonan semakan kehakiman adalah tidak matang; (b) sama ada remedi di bawah Akta tersebut terpakai untuk pemohon; (c) sama ada ketetapan awal adalah satu keputusan yang boleh tertakluk pada semakan kehakiman; dan (d) sama ada ketetapan

A awal member kesan pada pemohon apabila pemohon boleh untuk tidak terikat pada panduan awalan.

Diputuskan, membenarkan permohonan pemohon dengan kos RM5,000:

B (1) Mahkamah mendapati permohonan pemohon adalah bukannya tidak matang. Responden telah menafikan hak pemohon dengan mengatakan fi pembahagian adalah cukai. Pemohon telah mengalami masalah kewangan dan perlu membayar cukai (lihat perenggan 40).

C (2) Mahkamah tidak bersetuju dengan pandangan responden yang mengatakan ketetapan awal hanyalah satu kedudukan atau pendapat dan bukannya satu bentuk keputusan. Ketetapan awal ini dengan jelas memberi kesan pada pemohon dengan menyebabkan fi pembahagian tertakluk pada cukai mengikut perjanjian tersebut. Keputusan responden dalam ketetapan awal merupakan satu isu undang-undang D yang perlu ditentukan oleh mahkamah. Responden tiada asas untuk mengatakan ketetapan awal tersebut bukannya satu keputusan yang tertakluk pada semakan kehakiman (lihat perenggan 43, 45 & 54–55).

E (3) Tiada remedi alternatif yang boleh digunakan oleh pemohon mengenai keputusan responden melalui cara ketetapan awal. Responden telah terkhilaf dari segi undang-undang dengan mengatakan adanya remedi alternatif untuk pemohon di bawah Akta. Dalam kes semasa, tiada penilaian atau notis penilaian dibuat. Oleh itu, hak untuk merayu F kepada Pesuruhjaya Khas Cukai Pendapatan tidak timbul. Tiada remedi alternatif untuk pemohon sama ada di bawah Akta tersebut dan ini memberi kesan pada keputusan yang dibuat berdasarkan kes-kes yang telah diputuskan dan peruntukan dalam memberi keputusan dan remedi yang ada hanyalah melalui semakan kehakiman (lihat perenggan 59–61 & 67).

G (4) Mahkamah bersetuju dengan pemohon bahawa transaksi di bawah pembahagian membuat bayaran untuk mendapatkan dan mengagihkan salinan-salinan perisian, tindakan pembahagian sepatutnya tidak diambil kira dalam menganalisis cara transaksi untuk tujuan pembayaran H cukai. Bayaran di bawah transaksi-transaksi ini adalah dianggap sebagai keuntungan perniagaan di bawah perkara 8 Perjanjian Percukaian Bersama Malaysia–Belanda. Cukai responden berkenaan dengan fi pembahagian adalah salah (lihat perenggan 76–77).

I (5) Keputusan responden dalam ketetapan awal adalah ultra vires, tidak sah, terbatal dan melebihi autoriti di mana pembahagian yang perlu dibayar kepada PDL di bawah perjanjian adalah bukannya royalti (lihat perenggan 82).]

Notes

For cases on judicial review in general, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 318–518.

Cases referred to

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935; [1985] AC 374, HL (refd)

Damco Logistic Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2011) MSTC 30–033, HC (refd)

Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2016] MLJU 1839, HC (refd)

Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri Civil Appeal No W-01(A)-187–05 of 2016 (unreported), CA (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185, SC (refd)

Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Damco Logistics Malaysia Sdn Bhd Civil Appeal No W-01–424 of 2011 (unreported), CA (refd)

Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd [2017] 2 MLJ 197, CA (refd)

Ketua Pengarah Hasil Dalam Negeri v Thomson Reuters Global Resources (2016) MSTC 30–124, HC (refd)

Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1, FC (refd)

Maersk Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2013) MSTC 10–046, HC (refd)

Mak Sik Kwong v Minister of Home Affairs, Malaysia [1975] 2 MLJ 168 (refd)

Malayan United Industries Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2005] 6 MLJ 259; [2006] 5 CLJ 240, HC (refd)

Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145, FC (refd)

Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim [2011] 6 MLJ 490, FC (refd)

Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor [1981] 2 MLJ 199, FC (refd)

Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

R v Worthing Borough Council and Secretary of State for the Environment, ex p Burch (1983) 50 P & CR 53, QBD (refd)

Saujana Hotel Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] 9 MLJ

213; [2012] 4 CLJ 576, HC (refd)
Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555, CA (refd)
Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd [2017] 1 MLJ 689, FC (refd)

Legislation referred to

Malaysia-Netherlands Double Taxation Agreement articles 8, 12, 13(6)
Federal Constitution art 96
Income Tax (Advance Ruling) Rules 2008 rr 2(1), (3), 3(a), 15, 15(1), 16
Income Tax Act 1967 s 2, 99, 99(1), 109, 109B, 109F, 109H, 109H(1), 138B, 138B(1)

DP Naban (S Saravana with him) (Lee Hishammuddin Allen & Gledhill) for the applicant.
Muhammad Farid (Ridzuan Othman with him) (Senior Revenue Counsel) for the respondent.

Kamaludin Md Said J:

INTRODUCTION

[1] This is the applicant's application for judicial review dated 1 September 2016 for an order of certiorari to quash the advance ruling dated 7 June 2016 issued by the respondent informing the applicant that the payment to be made to a non-resident, IBM Ireland Product Distribution Ltd is a royalty and is subject to withholding tax.

[2] The applicant also seeks other remedies as disclosed in its notice of application for judicial review.

[3] For the purpose of the judicial review's application, both parties had filed the following cause papers:

(a) *permohonan semakan kehakiman* dated 1 September 2016;

(b) *afidavit sokongan* affirmed by Wong Chiun Chiek on 1 September 2016 ('afidavit sokongan pemohon');

(c) *pernyataan yang difailkan menurut A 53 k 3(2) Kaedah-Kaedah Mahkamah 2012* dated 1 September 2016;

(d) *afidavit jawapan responden* affirmed by Nor'aini bt Ja'afar on 2 December 2016 ('afidavit jawapan responden [1]');

(e) *afidavit jawapan* affirmed by Wong Chiun Chiek on 25 January 2017 ('afidavit jawapan pemohon [1]');

(f) *afidavit jawapan responden* [2] affirmed by Nor'aini bt Ja'afar on 23 February 2017 ('afidavit jawapan responden [2]');

(g) *afidavit jawapan* 2 affirmed by Wong Chiun Chiek on 28 March 2017 ('afidavit jawapan pemohon [2]);

(h) *afidavit jawapan responden* [3] affirmed by Nor'aini bt Ja'afar on 2 May 2017 ('afidavit jawapan responden [3]'); and

(i) *afidavit jawapan* 3 affirmed by Wong Chiun Chiek on 17 May 2017 ('afidavit jawapan pemohon [3]).

[4] The applicant and the respondent had filed their respective written submissions.

[5] The subject matter of review in this case is the respondent's decision vide the advance ruling. This can be found in paras 2, 3 and 4 of the advance ruling dated 7 June 2016 as follows:

> 2. Isu yang berbangkit daripada perkiraan
>
> 2.1 Sama ada bayaran yang dibuat yang dibuat oleh IMSB (Pemohon) kepada PDL (IBM Ireland Product Distribution Limited) di bawah SDA (software distribution agreement) untuk memperolehi program perisian komputer merupakan royalti di bawah seksyen 2 ACP (Akta Cukai Pendapatan 1967); dan
>
> 2.2 Sama ada bayaran tersebut tertakluk kepada cukai pegangan di bawah seksyen 109 ACP.
>
> 3. Peruntukan undang-undang
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> Peruntukan yang berkaitan adalah seksyen 2 dan seksyen 109 ACP serta Perjanjian Pengelakan Cukai Dua Kali di antara Malaysia dan Netherland.
>
> 4. Bagaimana peruntukan undang-undang terpakai kepada perkiraan
>
> Pendirian Lembaga Hasil Dalam Negeri Malaysia adalah bayaran untuk menggunakan atau hak untuk menggunakan memberi maksud di mana tuanpunya hakcipta, paten, rekaan atau model, pelan, formula rahsia dan sebagainya menyimpan hakmilik harta tersebut dan membenarkan harta tersebut digunakan atau memberi hak untuk menggunakan harta tersebut. Dengan itu, apabila PDL, tuanpunya harta masih menyimpan hakmilik harta tersebut dan membenarkan harta tersebut digunakan atau membenarkan hak untuk menggunakan harta tersebut, *bayaran berkaitan adalah royalti*.

[6] The applicant's case is that the respondent's decision vide the advance ruling that distribution fee payable under the proposed draft software distribution agreement is royalty is ultra vires, illegal, void, unlawful and/or in excess of authority on the bases below:

A (a) the respondent failed to apply and take cognisance of article 8 of the Malaysia-Netherlands Double Taxation Agreement (which is *gazetted* vide PU (A) 214/1988) ('the DTA');

(b) the definition of royalty as provided under article 13(6) of the DTA and
B supplemented by the Organisation for Economic Co-operation and Development ('OECD') Commentary on article 12 should apply and considered; and

(c) the established case laws which decided that definition provided in the Double Taxation Agreement shall prevail over the Income Tax Act 1967
C ('the ITA'), that the proposed draft software distribution agreement is not a royalty but business profits.

[7] The respondent's position is that its advance ruling, 'distribution fee' is
D treated as 'royalty' and the advance ruling is not a 'decision' but rather the position or opinion of the respondent as the applicant can opt not be bound by the advance ruling. Therefore, the application was filed prematurely. Even if it is a decision, the applicant has failed to exhaust the domestic remedy provided under the Income Tax Act 1967.

E

[8] After considering the facts and law in this present application, it is in my considered opinion that the advance ruling is binding on the applicant which constitute a decision that have affected the applicant. The decision of the respondent is not prematurely filed but is amenable to judicial review.

F

[9] Having considered the submissions, I agree with the applicant that the distribution fee payable under the proposed draft software distribution agreement is not a royalty. The application is allowed with cost of RM5,000.

G THE UNDISPUTED FACTS

[10] The applicant is in the business of distributing software where amongst others the applicant purchases, distributes and markets various computer
H software, providing various IT services and hardware products manufactured by companies within the IBM Group.

[11] One of the companies within the IBM Group, namely, IBM Ireland Product Distribution Ltd ('PDL'), maintains a significant software
I development capacity and has engaged in substantial software development. PDL has no office or employees in Malaysia. It also has no permanent establishment in Malaysia.

[12] PDL presently holds the rights to distribute software programs which operate on various platforms throughout Europe, Canada, the Middle East and the Asia Pacific regions.

[13] The applicant and PDL intends to execute a software distribution agreement ('agreement') which will grant the applicant the right to distribute the software programs developed and owned by PDL in Malaysia. This is a corporate decision that was made at the IBM Group level and many other companies in the IBM Group in other jurisdictions have executed this agreement.

[14] On 12 April 2016, the applicant made an advance ruling application through the applicant's tax agent, Messrs KP MG Tax Services Sdn Bhd to the respondent using the prescribed form and accompanied by the draft copy of the agreement, a description of the arrangement and an application fee of RM500.

[15] At the respondent's request on 6 May 2016, the applicant through its tax agent submitted a diagram summarising the arrangement under the draft agreement.

[16] On 7 June 2016, the respondent issued its decision contained in the advance ruling, which was received by the applicant on 20 June 2016 upon making a payment of RM5,175 to the respondent. The respondent relied on s 2 of the ITA and ruled that the distribution fee that the applicant will pay to PDL is royalty and thus, is subject to withholding tax under s 109 of the ITA.

[17] On 23 August 2016, the applicant reiterated to the respondent the reasons why the distribution fee is not royalty. Among others, the applicant relied on the decision of the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Damco Logistics Malaysia Sdn Bhd* Civil Appeal No W-01–424 of 2011 (unreported)), which was subsequently applied by this honourable court in *Maersk Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2013) MSTC 10–046 and *Ketua Pengarah Hasil Dalam Negeri v Thomson Reuters Global Resources* (2016) MSTC 30–124 (the latter which has since been affirmed by the Court of Appeal).

[18] On 31 December 2016, the applicant and PDL proceeded to execute the software distribution agreement.

A THE ISSUES

[19] For the applicant, the issue is whether the respondent's decision vide the advance ruling dated 7 June 2016 that distribution fee payable under the proposed draft software distribution agreement is royalty.

B

[20] For the respondent, various issues need to be considered by this court as follows:

(a) whether this application for judicial review is premature;

C

(b) shether the domestic/appeal remedy under the Income Tax Act is available to the applicant;

(c) whether the advance ruling is a 'decision' which is amenable to judicial review; and

D

(d) whether the advance ruling affects the applicant when the applicant can opt not be bound by the advance ruling.

OPINION OF THIS COURT

E

[21] The issues raised by the respondent are issues of jurisdiction. If the court agrees with the respondents on the issues, then this court has no jurisdiction to hear the applicant's application and the application can be dismissed in limine.

F *Whether the application for judicial review was filed prematurely*

[22] It is the respondent's contention that the applicant has failed to comply with the procedures for the application for advance ruling as provided under the Income Tax Act 1967 ('the Act') and Income Tax (Advance Ruling) Rules 2008 ('the Rules') and thus, the application for judicial review has been filed prematurely.

G

[23] As submitted by the respondent, the advance ruling dated 7 June 2016 issued by the respondent to the applicant is governed by s 138B of the Act and the Rules.

H

[24] Section 138B(1) of the Act and para 2(1) of the Rules provides that the respondent has the power to issue an advance ruling upon application by the applicant:

I

> 138B(1) Subject to this section or any rules prescribed under this act, on the application made by any person, the Director General shall make an advance ruling on the application of any provision of this act to the person and to the arrangement for which the ruling is sought.

2 Scope of Advance Ruling

(1) The Director General shall, on the application made by any person, make an advance ruling on how any provision of the act applies or would apply to the person and to the arrangement for which the advance ruling is sought.

[25] Paragraph 2(3) of the Rules provides that the advance ruling will be issued by the respondent for the arrangements that are seriously contemplated by the person applying for such ruling:

2(3) An Advance Ruling under sub rule (1) or (2) shall be issued for arrangements that are seriously contemplated by the person applying for a ruling under sub rule (1).

[26] Subparagraph 3(a) of the Rules further provides that the advance ruling will not be made by the respondent if at the time the application is made by any person relating to a particular arrangement, that person has entered into or effected such arrangement:

3 Circumstances where an Advance Ruling shall not be issued

The Director General shall not make an Advance Ruling in the following circumstances:

(a) where at the time the application for Advance Ruling is made or at any time before the Advance Ruling is issued, the person applying for the Advance Ruling has entered into or effected the arrangement for which the Advance Ruling is sought ...

[27] It is not disputed that the applicant has submitted the application for an advance ruling on 12 April 2016 on whether the payments to be made by the applicant to a non-resident, IBM Ireland Product Distribution Ltd under the proposed software distribution agreement are royalties and subject to withholding tax under the Act.

[28] Pursuant to the application, the respondent has issued an advance ruling dated 7 June 2016 informing the applicant that the payments to be made to the IBM Ireland Product Distribution Ltd under the proposed software distribution agreement are royalties and subject to withholding tax under the relevant ss 2 and 109 of the Act.

[29] Paragraph 15 of the Rules requires the applicant to take further action by disclosing in a return the issuance of the advance ruling, the reliance on the advance ruling in preparing and providing the return and whether if there is any material change to the arrangement relating to the advance ruling. Paragraph 15 of the Rules state as follows:

15 Disclosure of an advance ruling in the return

(1) Where an Advance Ruling has been issued to any person and the person is required to furnish a return under the Act for any year of assessment that relates to the period applicable under the advance ruling, that person shall, in preparing the return, take into account the manner in which a provision of the Act is applied to an arrangement pursuant to such Advance Ruling.

(2) For the purpose of sub rule (1), the person to whom the advance ruling applies shall disclose in the return —

(a) the issuance of the Advance Ruling;

(b) whether or not he has relied on the Advance Ruling in preparing and providing the return; and

(c) any material change to the arrangement to which in the Advance Ruling applies.

[30] It was submitted that the advance ruling dated 7 June 2016 specifically applies for the year 2016–2030 and that the applicant fails to provide evidence that it has complied with the requirements under para 15 of the Rules.

[31] The respondent's case is that the procedure prescribed by the law under the Rules has not been fully observed and complied with by the applicant to enable the respondent to verify whether or not the applicant has applied the advance ruling by disclosing it in a return. This renders the application for judicial review by the applicant to be prematurely filed before this court.

[32] The crux of the matter is whether the applicant has complied with para 15 of the Rules.

[33] The applicant submitted that the respondent has not proved the alleged failure to comply with the Rules and it was the applicant's case that nothing in the Act, the Rules or any written law makes the disclosure of a return in compliance with para 15 of the Rules a preliminary requirement before the application could be filed.

[34] Examining para 15(1) of the Rules closely, it provides that upon the issuance of the advance ruling, the applicant is required to furnish a return under the Act for any year of assessment that relates to the period applicable under the advance ruling. As submitted by the respondent, para 15(1) of the Rules is a mandatory requirement for the applicant to comply as it affects the tax treatment for the years of assessment in which the transaction relates to and in this particular case, the transaction for the years of assessment 2016–2030. The tax implication arises in the case where the applicant discloses in the return that it is relying on the advance ruling issued by the respondent ie that the payment to be made by the applicant to IBM Ireland Product Distribution Ltd

is a royalty under s 2 of the Act which is subject to withholding tax under s 109 of the Act.

[35] In the present case, the advance ruling issued by the respondent was in regard with the YAs 2016–2030. In coming to the decision, the respondent knew that the then proposed arrangement was seriously contemplated by the applicant that a concerted effort and a definite course of action had been made to undertake the arrangement in the near future (see para 5.1 and 5.2 of the Guidelines on Advance Ruling ('the Guidelines')) under the definition of terms 'Arrangement' and 'Seriously contemplated').

[36] In fact, the arrangement had been duly executed by the applicant on 31 December 2016, soon after the issuance of the advance ruling by the respondent. By subjecting the distribution fee to withholding tax, the applicant submitted that the respondent has altered and deprived the applicant of its rights, since the applicant will suffer financial detriment and will have to pay a tax.

[37] The applicant made an advance ruling application on 12 April 2016, and an application fee of RM500. It is noted that the Guidelines on advance rulings issued and updated by the respondent on 10 June 2016 which prescribed that:

> 4.1 *An advance ruling on the provision of the Act is binding upon a person in relation to an arrangement and only for the period or year of assessment specified in the advance ruling* ...
>
> 4.2 *An Advance ruling is binding upon the DGIR*, subject to any qualifications stated in the advance ruling ...

[38] On the face of the above mentioned event, clearly, the applicant is taking steps to get the court intervention to quash the respondent's advance ruling before submitting the return. There is no qualification stated in the advance ruling for the respondent to change its decision therefore, as far as the advance ruling is concern in relation to the arrangement for the period or year of assessment specified in the advance ruling, the applicant has no choice but to accept that the payment to IBM Ireland Product Distribution Ltd is royalty and subject to withholding tax under the Act. This is because the advance ruling is final.

[39] Paragraph 16 of the Rules provides as follows:

> (1) An advance ruling issued to any person for the purpose of any arrangement shall be final.

[40] I agree with the applicant that by subjecting the distribution fee to withholding tax, the respondent has altered and deprived the applicant of its rights, since the applicant will suffer financial detriment and will have to pay a tax. The advance ruling is a final and binding. There is an issue of law whether such payment of tax is authorised by any legislation or authority. In view of the above finding, this court holds that the applicant's application is not premature.

Whether the advance ruling affects the applicant when the applicant can opt not be bound by the advance ruling

[41] Based on the explanation in the above paragraphs and in the circumstances of this case, it is my view that the issue of the applicant is required to submit the return subject to para 15 of the Rules or whether the applicant can opt not be bound by the advance ruling does not arise. I also hold that the contention by the respondent that the applicant's failure to file the return under para 15 of the Rules thus, it is not known whether the applicant has applied the advance ruling does not arise.

[42] It is for the applicant to take the necessary steps to challenge the respondent's advance ruling.

Whether the advance ruling is a 'decision' which is am enable to judicial review

[43] In this context, I do not agree with the respondent's averment that the advance ruling is merely the position or opinion of the respondent and hence not a decision. As submitted by the applicant, in the case of *R v Worthing Borough Council and Secretary of State for the Environment, ex p Burch* (1983) 50 P & CR 53, the English courts have held that the opinion of the Secretary of State could also be the subject of judicial review. It was held that:

> In my judgment, *it is quite unreal to suppose that a local planning authority would do otherwise than accept the opinion as decisive*. The present case is, indeed, an example of exactly that, and, as I have read, the planning officer is advising his committee that to do other than approve the application would be contrary to the intention of the Secretary of State. So, in practice, *I am quite satisfied that the procedure that is envisaged by the circular does constrain the local authority*. For those reasons, I am of the opinion that Mr Mole is correct in his contention that the opinion should be quashed ...

[44] In the present case, notwithstanding the respondent's averment that the advance ruling is a mere opinion, the explanatory note to cl 26 of the Finance Bill 2006 and Rules have explicitly state that the advance ruling is final and binding on both parties. In this regard, it would be quite unreal to suppose that the advance ruling is a mere opinion that is not decisive.

[45] Section 138B of the Act is binding on the applicant and respondent. In this regard, the respondent has no basis to aver that the advance ruling does not amount to a 'decision'.

[46] The explanatory note reads:

> Clause 26 also seeks to introduce a new Section 138B into Act 53. With this proposed amendment, a person may request for a ruling from the Director General of Inland Revenue on the application of any provision of Act 53 to a particular type of arrangement. *Subject to certain qualifications. the ruling issued under this section is binding on the person and the Director General.*
>
> These amendments come into operation on 1 January 2007.

[47] It is always important to decipher the intention of Legislature for introducing such amendment as Parliament does not act in vain (see *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1, which was applied in *Saujana Hotel Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 9 MLJ 213; [2012] 4 CLJ 576).

[48] As Parliament does not act in vain and the explanatory note clearly illustrates Parliament's intention in introducing s 138B, the nature of the advance ruling is such that is conclusive, decisive and binding. See: The Federal Court's ruling in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265, it was held '... If this court were to accept the argument of counsel for the Taxpayer, then we would not be promoting the purpose or object of the 1979 Act but be defeating it. For, in such event we would, through unauthorized legislative power, be re-writing statute'.

[49] The Federal Court in the case of *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145 has held that 'adversely affected' test is the single test for all the remedies under judicial review.

> ... in the instant case, the appellants made the application under O 53 of the ROC to seek remedies which were classified as public law remedies. As such, the test propounded in the Lim Kit Siang's case was not applicable to the present proceedings. Instead the 'adversely affected test', a single test for all the remedies provided for under O 53 of the ROC was to be preferred (see para 53).
>
> (2) In order for an applicant to pass the 'adversely affected test', the applicant had to show *he had a real and genuine interest in the subject matter*, which was different from the 'sufficient interest' test applied to English cases under the English Supreme Court Rules 1977.

[50] Further, as aptly summarised in the Federal Court case of *Members of the*

Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim [2011] 6 MLJ 490:

> [26] It is trite law that the purpose of an order for certiorari is to quash the legal effect of a decision. In England, in the case of *Civil Service Unions v Minister for Civil Service* [1984] 3 All ER 935; [1985] AC 374 *the House of Lords held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.*
>
> [27] We adopt the same view. Under the scheme of Order 53 of the RHC, *only a person adversely affected by the decision of a public authority shall be entitled to make the application for judicial review*. In the present case, there is no dispute that the Commission is a public authority. But we are of the view that the Commission is not a decision making body. A closer look at the Commission's report will reveal that the Commission does not make legal decision. The report consists of findings and recommendations of the Commission on the five Terms of Reference entrusted upon them to do. Being mere findings and recommendations, *it do not bind the respondents, not even the government*.
>
> ... The Commission merely investigates and does not decide. *Its findings and recommendations are not binding on anybody, not even the government.* Thus, we hold that the findings and recommendations of the Commission do not come within the ambit of O 53 of the RHC ...

[51] As stated above in relation to the binding nature of the advance ruling, and especially in light of the fact that the applicant had executed the agreement, the 'decision' vide the advance ruling to subject the distribution fee to withholding tax gives rise a triable issue on question whether such decision contravenes art 96 of the Federal Constitution, which expressly states that 'No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law'. The decision of the respondent as submitted, may also be contrary to decisions of this court that have determined that distribution fee in the nature of the distribution fee in the present matter is not subject to withholding tax.

[52] This principle is also lucidly expressed by Abdoolcader J (as His Lordship then was) in *Mak Sik Kwong v Minister of Home Affairs, Malaysia* [1975] 2 MLJ 168 when His Lordship said that:

> I think it is clear that *an act or decision may be held to be of a judicial character if it imposes obligations upon or affects the rights of individuals*. These rights or duties need not be in any sense private rights or duties of the individuals affected; *it is sufficient that their rights as citizens should be in jeopardy*.

[53] Further, in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] AC 374 Lord Diplock laid down the following general principles:

> To qualify as a subject for judicial review, *the decision must have consequences which affect some person (or body of persons)* other than the decision-maker, although it may affect him too. It must affect such other person either: (a) by *altering rights or obligations of that person which are enforceable by or against him in private law;*

[54] In the present case, the advance ruling clearly has consequences which affect the applicant by subjecting the applicant to withholding tax for 'distribution fee' payable pursuant to the agreement, notwithstanding that the draft agreement and agreement subsequently executed clearly states that it does not grant the applicant any proprietary right, copyright or know-how of any nature of the products to be purchased, distributed and sold by the applicant. The decision of the respondent in the advance ruling therefore, gives rise to an issue of law for this court to determine whether the distribution agreement and payment made is within the meaning of 'royalty' under the Act nor the Malaysia-Netherlands Double Taxation Agreement PU (A) 214/1988 ('DTA').

[55] Thus, I agree with the applicant that the respondent has no basis to aver that the advance ruling does not amount to a 'decision' susceptible to judicial review.

Whether the alternative or domestic remedy is available under the Income Tax Act 1967 for advanced ruling

[56] It was the submission of the respondent that the application for judicial review is not applicable against the respondent when there is an alternative remedy provided under the Act and thus, should be exercised only in exceptional cases.

[57] The law is trite as held in many cases cited by the respondents. The court must be vigilant when faced with the judicial review application and must exercise the discretion only in very exceptional cases, in that, when the applicant is able to demonstrate there was lack of jurisdiction, abuse of power or breach of natural justice (see the High Court *Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2016] MLJU 1839 and subsequently affirmed by the Court of Appeal in *Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* Civil Appeal No W-01(A)-187–05 of 2016 (unreported)). In *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 it was held that where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

[58] It was the respondent's contention that under the Act, a person is provided with an avenue to appeal to the Special Commissioners of Income Tax if the person is aggrieved by an assessment made by the Director General of Inland Revenue. Section 99(1) of the Act provides the right of a tax payer to appeal to the Special Commissioners of Income Tax if he is aggrieved by the assessment (see: *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555 at p 562; *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563 and *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197).

[59] Having considered the respondent's submission, nevertheless, contrary to the respondent's averment, I found that there are no alternative remedies available to the taxpayer/applicant vis a vis the respondent's decision by way of an advance ruling.

[60] Regarding the respondent's averment that there is an alternative remedy available for the applicant under the Act, my view is that the respondent has misinterpreted the law. Under s 99 of the Act, a right to appeal only arise for 'an assessment made' by filing a written notice of appeal within 30 days 'after the service of the notice of assessment'.

[61] In this case there is no assessment made, nor is there any service of the notice of assessment in this case. Hence, the right of appeal to the Special Commissioners of Income Tax ('SCIT') does not arise. There is no alternative remedy under s 99 of the Act available to the applicant.

[62] The cases which have been cited by the respondent in support of the respondent's submission are all distinguishable from the present case. The main and substantial difference in those cases is that an assessment or a notice of assessment had been issued by the respondent and hence the taxpayers in those cases had a right to appeal to the SCIT but they chose to appeal by way of judicial review against the decision of the respondent to issue assessments or notices of assessment. Therefore, an alternative remedy was available to those taxpayers.

[63] However, there has not been any notice of assessment or assessment issued by the respondent to the applicant. As a result of that, the applicant does not have a right to appeal under s 99 of the Act. In *Malayan United Industries Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2005] 6 MLJ 259; [2006] 5 CLJ 240, the High Court held that in cases where no assessment has been made, judicial review is the most appropriate, convenient and suitable procedure for the applicant to challenge the respondent's decision.

[64] Furthermore, the remedy to appeal to the SCIT under s 109H of the

Act is not available to the applicant at all material times. Under s 109H(1), a payer under ss 109, 109B or 109F may make an appeal to the SCIT within 30 days *from the date an amount is due to be made to the Director General* under that section.

[65] As at the times when the decision and the application were made, no amount was due from the applicant to the respondent under ss 109, 109B or 109F of the Act. As a result, no right of appeal could arise under s 109H in the way submitted by the respondent.

[66] The only subject matter in dispute here is the decision premised upon a proposed arrangement made by the respondent by way of advance ruling which according to para 16 of the Rules is final and no appeal shall be lodged against the advance ruling.

[67] Therefore, it is clear from the Rules that the applicant is not accorded any recourse or alternative remedy either under the Act or otherwise with regards to the respondent's failure to appreciate and give effect to the settled case law and legislation in coming to the decision, and the only remedy available is by way of judicial review which is inherent in the power of High Court (see: *Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199; *Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd* [2017] 1 MLJ 689; and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145).

[68] Thus, notwithstanding para 16 of the Rules, wherein it is patently clear that no appeal shall be lodged against any advance ruling; nonetheless, this does not operate to estop the present application. As seen from *Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd* [2017] 1 MLJ 689:

> [49] We are of the view that the normal effect of a finality clause is to prevent any appeal. Such a provision is important in crystallising the position that the authority has to decide only once and thereafter is without jurisdiction in the matter. In other words, such a decision is final and irrevocable.
>
> [50] In agreeing with the decision of *Ismail Abdullah*, we would also say this — that the clear words of s 16(2) call for a sensible approach since public policy demands that finality to the decision of the state authority must be accepted and acknowledged.
>
> [51] We must also say that *the law on the finality of the decision of the state authority under s 16(2) must not be misunderstood. Although the decision of the state authority is final, the appellant has a right to resort to the supervisory jurisdiction of the court to examine the decision of the state authority as to whether there is illegality, procedural impropriety or irrationality.*

Whether the distribution fee payable under the proposed draft software distribution agreement is royalty

[69] Since this court has ruled that the applicant's application has been properly made then comes to the determination of this court whether *software distribution agreement is royalty*.

[70] The applicant submitted that as seen from the agreement, the payments:

(a) does not grant the applicant any proprietary right, copyright or know-how of any nature on the PDL products that are to be purchased, distributed and sold by the applicant. Neither is the applicant given the right to reproduce software programs or exploit any of the proprietary rights of the products by PDL. This is expressly stated at section 7 of the draft software distribution agreement;

(b) are not for the right to reproduce the software programs but instead are for the cost of purchasing the products, which the applicant will distribute and resell with a mark-up in Malaysia;

(c) does not include any payment for the granting of licences or copyright or partial copyright by PDL. The applicant will not at any time have any such right in relation to the products to be purchased from PDL and to be sold by the applicant;

(d) are not for the 'right to use' any software systems as it was not a payment made for the rights to exploit a 'know-how' or information. The applicant also does not acquire a general license for the use of the software or the grant of a license or copyright from PDL;

(e) will be treated and recognised as its business income in Netherlands and not as royalty, which is indicative of the true nature of the distribution fee;

(f) the rights acquired in relation to the copyright are limited to those necessary for the commercial intermediary to distribute copies of the software program. In such transactions, distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights. Payments in these types of transactions would be dealt with as business profits;

(g) para 14.4 of the OECD Commentary on article 12 refers to arrangements between a software copyright holder and a distribution intermediary granting to the distribution intermediary the right to distribute copies of the program without the right to reproduce that program; and

(h) in accordance with the law, when there is a conflict between the provision of the ITA and Malaysia-Netherlands DTA, the provision of the latter shall prevail.

[71] Section 7.1 of the agreement clearly provides that the distributor shall have no right to copy, modify, replicate, duplicate or otherwise change any program included in the agreement. Section 7.2 also clearly provides that PDL does not transfer a program's title. Section 1.3 of the agreement defines 'Programs' includes the original and all whole or partial copies:

(a) machine-readable instruction and data;

(b) components;

(c) audio-visual content (such as images, text, recordings, or pictures); and

(d) related licensed materials.

[72] Clearly the agreement only grants to the applicant the right to distribute software programs in Malaysia and there is no element of proprietary rights or know how being granted or transferred to the applicant. I noted that this fact is recognised by the respondent itself in its advance ruling at para 1.4 as follows:

> 1.4 Cadangan PDL dan IMSB untuk mewujudkan SDA bagi membolehkan IMSB mengedarkan perisian kepada pelanggan di Malaysia. Dalam SDA tersebut IMSB dilantik oleh PDL sebagi pengedar bukan ekslusif di Malaysia. Hak JMSB mengiklut kandungan SDA —
>
> (i) Adalah untuk menggunakan dan memasarkan Program tersebut kepada pelanggan di Malaysia sahaja;
>
> (ii) Tidak termasuk hak harta;
>
> (iii) Tidak termasuk hak harta intelek dalam program;
>
> (iv) Tidak termasuk hak untuk membuat Salinan mereplikakan, mengubah suai, membuat Salinan pendua atau lain-lain kepada Program tersebut;
>
> (v) Adalah untuk memberi pengguna terakhir capaian kepada maklumat yang boleh pengguna terakhir muat turun Salinan Program dalam media fizikal untuk penggunaan selanjutnya;
>
> (vi) Adalah untuk memberi pengguna terakhir membuat Salinan tambahan Program dalam media fizikal untuk pengggunaan selanjutnya.

[73] Article 13(6)(a) of the DTA clearly defines royalty to mean 'a payment of any kind received as a consideration for the use of, or the right to use, any patent, trademark, design or model, plan, secret formula or process, copyright or any scientific for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience'.

[74] Paragraph 14.4 of the OECD Commentary on article 12 further refers to arrangements between a software copyright holder and a distribution intermediary granting to the distribution intermediary the right to distribute copies of the program without the right to reproduce that program.

[75] In these transactions, the rights acquired in relation to the copyright are limited to those necessary for the commercial intermediary to distribute copies of the software program. In such transactions, distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights.

[76] Therefore, I agree with the applicant that in a transaction where a distributor makes payments to acquire and distribute software copies (without the right to reproduce the software), the rights in relation to these acts of distribution should be disregarded in analysing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business profits under article 8 of the DTA.

[77] The respondent's tax treatment in respect is of 'distribution fee' is erroneous. This is supported by the decision of the High Court in *Damco Logistic Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2011) MSTC 30–033 which was subsequently upheld by the Court of Appeal, it was seen that:

> AP Moeller-Maersk A/S Group (APMM) developed Electronic Data Processing (EDP) Systems. The Systems was made available for the use of its group of companies in the course of their business. The EDP Systems was necessary for the applicant to conduct its operations in Malaysia as part of the global activities of the APMM Group. The applicant paid EDP charges for the EDP services ...
>
> in treating the EDP charges as royalty I agree with the submission of learned counsel for the Applicant that *the definition of 'royalty' under the DTA applies and not ITA*. It is difficult to come to terms with the contention of the learned counsel for the Respondent that the definition in ITA applies in light of clear authority that the DTA takes precedent over ITA as decided in the Federal Court case of *Director General of Inland Revenue v Euro medical Industries Ltd* [1983] CLJ Rep 128 ...
>
> 2. The *term 'royalties'* as used in this article means a payment of any kind received as consideration for the *use of, or the right to use, any copyright, any patent, trademark, design or model, plan, secret formula or processor for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience* but does not include any royalty or other amount paid in respect of literary or artistic copyrights or of motion picture films or of tapes for television or broadcasting or of the operations of a mine, oil well, quarry or other places of extraction of natural resources or of timber or forest produce.
>
> 15. The DTA [is] modelled after the OECD Model Convention containing Commentary that determines the construction of Article XII(2) of DTA ...

16. Paragraph 11 of the Commentary explains the *difference between contract for provision of services and a know-how contract*. In fact, paragraph 11.3 outlines these distinctions. Examples given are of payments which should not be considered to include know how includes payments, for after sale service, services rendered under guarantee, for technical assistance, professional opinion by engineer, advocate or accountant, payments for advice provided electronically, for accessing through computer network etc.

17. Coming back to EDP charges here, *it is clear that they were not payments for the right to use a software system. The nature of payments in this case could not constitute royalty under this Article because they are merely payments for services rendered by APMM, where the Applicant accessed and used the APMM's IT system and communication network. There was no involvement of know-how to allow the Applicant to acquire any rights or partial rights in this contract of service.*

[78] Further, in the High Court's decision in *Ketua Pengarah Hasil Dalam Negeri v Thomson Reuters Global Resources* (2016) MSTC 30–124 which was subsequently upheld by the Court of Appeal. The taxpayer receives distribution fee from its intermediary, TRM for the latter to distribute, market and sell the taxpayer's products, ie 'information services' and 'dealing services'. The intermediary, TRM does not have the right to reproduce the products in Malaysia and payment is only for distribution of the products: The High Court held:

43. First there is no reason for this court to discard the findings made by the SCIT that the distribution fee is not a royalty. These findings are stated in the following manner:

> The business and products of the Taxpayer in the present appeal as stated in sub-para 7.1(ii) herein, to be very similar in category to the Electronic Data Processing (EDP) Systems developed by APMM in *Damco*.

Secondly, we also rule that the nature of the payment called distribution fee made by TRM under the Agreement in present appeal pursuant to TRM's obligation under the said Agreement as stated in sub-para 7.1(V) herein, is also very similar in category to the nature of payments in *Damco* ...

... but *TRM does not have the right to reproduce the products* in Malaysia; *nor to exploit any of the intellectual property rights of the products: nor did TRM obtain any proprietary right or know-how in the Taxpayer's products* under Clause 5 of the Agreement. In short *TRM is only granted access to the TRN to enable them to offer the products to the customers in Malaysia*, see sub-para 7.2(xvi) herein and that *the distribution fee does not permit TRM to exploit or access the copyright embedded in products* as seen in sub-para 7.2(xvii) herein.

44. Further there is also no reason to find the distribution fee should be categorized as royalty because *the services rendered cannot be considered to involve any special commercial knowledge. The products of the Taxpayer being utilized by TRM does not concern imparting of special commercial knowledge.* It is only in respect of providing

basically information and business contents to TRM who paid the Taxpayer the distribution fee.

45. There is also *no transfer, grant or the use of know-how or proprietary rights in consideration of the distribution fee.* The services provided by the Taxpayer to TRM are merely information services.

[79] Based on the decisions stated above, I agree with the applicant that:

(a) one has to take cognisance of article 8 of the DTA;

(b) one has to apply the definition of 'royalty' as provided under article 13(6) of the DTA and supplemented by the OECD Commentary on article 12;

(c) applying the definition of 'royalty' under the DTA, the 'distribution fee' does not fall under the definition of 'royalty' under article 13(6) of the DTA;

(d) the respondent failed to apply and take cognisance of established case law which decided that definition provided in the DTA shall prevail over the ITA in determining whether a payment is royalty or business profits; and

(e) in any event, if the 'distribution fee' is business profits of PDL, it is only taxable in the Netherlands and not taxable in Malaysia by virtue of article 8 of the Malaysia-Netherlands DTA.

[80] In the present application, there is no transfer, grant or use of know how or any proprietary rights in relation to the program. It is to use and market the program to customers within malaysia only and the definition of program it does not include:

(a) property rights;

(b) intellectual property rights in the program;

(c) the applicant does not have right to copy, modify, replicate, duplicate or change any program;

(d) nothing in the agreement shall be construed to give the applicant any right to make copies of the program for purposes of distribution to public by sale or other transfer of ownership, or by rental, lease or lending; and

(e) the agreement does not grant the applicant any copyright rights in the programs; nor the applicant has the right to transfer copyright rights with respect to the programs.

[81] The payments to be made by the applicant are not for the right to reproduce the software programs but instead are for the cost of purchasing the PDL products, which the applicant will distribute and resell with a mark-up in Malaysia. I agree with the submission of learned counsel for the applicant that the definition of 'royalty' under the DTA applies and not ITA.

CONCLUSION

[82] In the conclusion I hold that the decision of the respondent in its advance ruling dated 7 June 2016 is ultra vires, illegal, void, unlawful and/or in excess of authority as 'distribution fee' payable to PDL under the agreement for the purchase, distribution and sale of PDL's products (ie software programs) is not royalty.

[83] The applicant's application is allowed with costs of RM5,000.

The applicant's application allowed with cost of RM5,000.

Reported by Mohd Kamarul Anwar